

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 JAMES M. BREWSTER and KAORI T.
9 BREWSTER,

10 Plaintiffs,

11 v.

12 SEASIDE TRUSTEE OF
13 WASHINGTON, INC., et al.,

14 Defendants.

CASE NO. C16-5732 BHS

ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFF'S MOTION TO
VOLUNTARILY DISMISS

15 This matter comes before the Court on Plaintiffs James and Kaori Brewster's
16 ("Brewsters") motion to voluntarily dismiss. Dkt. 82.

17 On November 22, 2017, the Brewsters filed the instant motion requesting that the
18 Court dismiss their claims without prejudice. *Id.* The Brewsters assert that, after their
19 attorney withdrew, the matter is "too cumbersome to litigate at this time." *Id.* at 2. On
20 December 11, 2017, Defendants Bayview Loan Servicing, LLC, Mortgage Electronic
21 Registration Systems, Inc., Seaside Trustee of Washington, Inc., and The Bank of New
22 York Mellon ("Defendants") responded objecting to dismissal with prejudice. Dkt. 83.

1 Once a party answers the complaint, “an action may be dismissed at the plaintiff’s
2 request only by court order, on terms that the court considers proper.” Fed. R. Civ. P.
3 42(a)(2). “When ruling on a motion to dismiss without prejudice, the district court must
4 determine whether the defendant will suffer some plain legal prejudice as a result of the
5 dismissal.” *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996). The
6 Ninth Circuit has held that legal prejudice is “prejudice to some legal interest, some legal
7 claim, [or] some legal argument.” *Id.* at 97. However, “expense incurred in defending
8 against a lawsuit does not amount to legal prejudice.” *Id.* If the court conditions
9 dismissal on the payment of costs and expenses, “a defendant is entitled only to recover .
10 . . attorneys fees or costs for work which is not useful in continuing litigation between the
11 parties.” *Koch v. Hankins*, 8 F.3d 650, 652 (9th Cir. 1993).

12 In this case, Defendants assert numerous arguments against the Brewsters’ request
13 to dismiss without prejudice. First, to the extent that Defendants seek affirmative relief in
14 their response, the Court denies the requests. For example, Defendants seem to seek a
15 ruling that they are entitled to attorney’s fees and costs pursuant to provisions in the deed
16 of trust. Dkt. 83 at 6–9. Defendants also embedded a motion to dismiss the Brewsters’
17 claims arguing that some claims fail to state a claim and others are time-barred. Dkt. 83
18 at 11–18. These objections are procedurally improper, and Defendants have failed to cite
19 any authority for the proposition that they should be considered in a response to a motion
20 to dismiss.

21 Second, to the extent that Defendants will suffer some legal prejudice for a
22 dismissal without prejudice, the Court agrees. The Court finds that some conditions

1 should be imposed to protect Defendants from incurring repetitive costs in the event the
2 Brewsters refile these claims. Therefore, the Court imposes the following conditions:

3 1) If the Brewsters re-file the same or a substantially similar lawsuit
4 in any other court, they will not object to Defendants use of any discovery
5 conducted, exchanged, or obtained in this litigation on grounds that the
6 discovery was not conducted, exchanged or obtained in the Brewsters' re-
7 filed suit;

8 2) If the Brewsters re-file the same or a substantially similar lawsuit,
9 the Brewsters shall bear Defendants costs from this suit for discovery,
10 motion practice, or any other items, which Defendants are able to
11 demonstrate cannot be used in the future litigation;

12 3) The Brewsters shall file a notice no later than January 12, 2018,
13 stating that they accede to the court's conditions before a dismissal without
14 prejudice will be entered in this matter, or that they will instead proceed
15 with this case. *See, e.g., Mitchell-Jones v. Menzies Aviation, Inc.*, C10-
16 1190JLR, 2011 WL 3273221, at *4 (W.D. Wash. July 28, 2011); *Chicano*
17 *v. Monier, Inc.*, No. C06-5028FDB, 2007 WL 951761, at *3 (W.D. Wash.
18 Mar.27, 2007). Failure to respond will be considered as an acceptance of
19 these conditions; and

20 5) If a dismissal without prejudice is entered, the court will retain
21 jurisdiction over this lawsuit for the limited purpose of hearing and ruling
22 on any motions by Defendants for costs and reasonable attorney's fees that
should be awarded if the Brewsters refile the same or a substantially similar
lawsuit.

IT IS SO ORDERED.

Dated this 22nd day of December, 2017.



BENJAMIN H. SETTLE
United States District Judge